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No. 96-1648

In the Supreme Court of the United States

OCTOBER TERM, 1996

RICHARD F. RICHENBERG, JR., PETITIONER

v.

WILLIAM S. COHEN, SECRETARY OF DEFENSE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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19 pp

QUESTION PRESENTED

The Act of Congress governing homosexual conduct in the military, 10 U.S.C. 654, requires separation of a service member who, like petitioner, states that he is a homosexual and fails to rebut the presumption arising from that statement that he has engaged in, or has a propensity to engage in, homosexual acts. The question presented is:

Whether 10 U.S.C. 654 and petitioner's discharge under it are consistent with the equal protection component of the Fifth Amendment's Due Process Clause, the First Amendment, the Bill of Attainder Clause, and the Administrative Procedure Act.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-22) is reported at 97 F.3d 256. The opinion of the district court (Pet. App. 24-51) is reported at 909 F. Supp. 1303.

JURISDICTION

The judgment of the court of appeals was entered on October 3, 1996. A petition for rehearing was denied on January 17, 1997. Pet. App. 62. The petition for a writ of certiorari was filed on April 16, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Act of Congress governing homosexual conduct in the military, 10 U.S.C. 654 (Pet. App. 65-71), is discussed in detail in our brief in opposition in *Thomasson* v. *Perry*, No. 96-1, in which this Court denied certiorari on October 21, 1996. 117 S. Ct. 358.[1] Congress found that the longstanding "prohibition against homosexual conduct * * * continues to be necessary in the unique circumstances of military service." 10 U.S.C. 654(a)(13). Congress also determined (10 U.S.C. 654(a)(15)):

> The presence in the armed forces of persons who demonstrate a propensity or intent to engage in homosexual acts would create an unacceptable risk to the high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability.

Accordingly, the Act provides for separation from service if a member has: (1) "engaged in, attempted to engage in, or solicited another to engage in a homosexual act"; (2) "stated that he or she is a homosexual or bisexual, or words to that effect, unless there is a further finding, made and approved in accordance with procedures set forth in the regulations, that the member has demonstrated that he or she is not a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts"; or (3) "married or attempted to

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[1] We have furnished counsel for petitioner with copies of our briefs in opposition in *Thomasson* and in *Selland* v. *Cohen*, cert. denied, 117 S. Ct. 1691 (1997) (No. 96-1238), which involved similar issues.

marry a person known to be of the same biological sex." 10 U.S.C. 654(b)(1)-(3).[2]

2. Pursuant to statutory provisions for the issuance of implementing regulations and procedures, the Department of Defense promulgated several directives to govern separations under the Act. DoD Directive 1332.30 (Dec. 21, 1993) (Pet. App. 72-106), applicable to officers, governs this case, and a substantially similar directive, DoD Directive 1332.14, applies to enlisted personnel. To implement the "statements" provision of the Act (10 U.S.C. 654(b)(2)), DoD Directive 1332.30 provides that a statement by an officer that he "is a homosexual or bisexual, or words to that effect, creates a rebuttable presumption that the officer engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts." DoD Dir. 1332.30 Enc. 2, ¶ C.1.b; Pet. App. 83. The officer is "given the opportunity to rebut the presumption by presenting evidence" to an administrative board "demonstrating that he * * * does not engage in, attempt to engage in, have a propensity to engage in or intend to engage in homosexual acts." *Ibid.*

A "[p]ropensity to engage in homosexual acts" is defined as "more than an abstract preference or desire to engage in homosexual acts; it indicates a *likelihood* that a person engages in or will engage in homosexual acts." DoD Dir. 1332.30 Enc. 1, ¶ 13; Pet.

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[2] The Act defines "homosexual act" as "(A) any bodily contact, actively undertaken or passively permitted, between members of the same sex for the purpose of satisfying sexual desires; and (B) any bodily contact which a reasonable person would understand to demonstrate a propensity or intent to engage in an act described in subparagraph (A)." 10 U.S.C. 654(f)(3).

App. 79 (emphasis added). By contrast, sexual orientation—defined as "[a]n abstract sexual preference for persons of a particular sex, as distinct from a propensity or intent to engage in sexual acts" (DoD Dir. 1332.30 Enc. 1, ¶ 16; Pet. App. 79)—"is considered a personal and private matter, and is not a bar to continued service * * * unless manifested by homosexual conduct." DoD Dir. 1332.30 Enc. 2, ¶ C; Pet. App. 81-82.[3] An officer's statement that he is a homosexual "is grounds for separation not because it reflects the member's sexual orientation, but because the statement indicates a likelihood that the member engages in or will engage in homosexual acts." DoD Dir. 1332.30 Enc. 2, ¶ C; Pet. App. 81. The Directive also sets forth the types of evidence an officer may offer to rebut the presumption. DoD Dir. 1332.30 Enc. 2, ¶ C.1.b; Pet. App. 83-84.

3. Petitioner, then a captain in the Air Force, applied for separation from the Air Force. Pet. App. 6. Because he was nearing completion of a training program for an assignment to Saudi Arabia, the Air Force denied his request. *Ibid.* Petitioner then informed his commanding officer that he is homosexual, adding that he realized that by making that statement, he was "forcing [his commander] to take actions which may ultimately result in my discharge." *Id.* at 6-7. The Air Force then initiated a discharge proceeding against petitioner under the military's former regulatory policy regarding homo-

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[3] "Homosexual conduct" is defined by the directive as "[a] homosexual act, a statement by the Service member that demonstrates a propensity or intent to engage in homosexual acts, or a homosexual marriage or attempted marriage." DoD Dir. 1332.30 Enc. 1, ¶ 9; Pet. App. 78.

sexual conduct in the military. *Id.* at 7, 29. A board of inquiry recommended that petitioner be given a general discharge, but before the Air Force took final action on that recommendation, 10 U.S.C. 654 and its implementing directives superseded the former policy. *Id.* at 7, 29, 54. The Secretary of the Air Force directed that petitioner and the only other similarly situated Air Force service member be reprocessed under the new policy. *Ibid.*; C.A. App. 436, 618.

A second board of inquiry then conducted a new hearing. Pet. App. 7, 29-30. At that hearing, petitioner acknowledged his prior statements but testified that he had not engaged in any "prohibited conduct" in the past and that he would not do so in the future. *Id.* at 30. He also testified about his physical attraction to men. C.A. App. 302-305. Based upon the totality of the evidence, the board found that petitioner had stated that he is a homosexual and that he had a propensity or intent to engage in homosexual acts. Pet. App. 59-60. The board recommended that petitioner be honorably discharged. *Id.* at 60. That recommendation was reviewed and approved, and petitioner was then ordered to be honorably discharged. *Id.* at 52-58.

4. Before that order became effective, petitioner brought this action in the district court seeking to enjoin his discharge. Pet. App. 30. The district court granted petitioner a temporary restraining order, but later entered summary judgment for the government. *Id.* at 23-51. It held that 10 U.S.C. 654 and its implementing directive did not violate petitioner's rights under the Constitution or the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.* Pet. App. 51.

The Eighth Circuit denied petitioner's motion to stay his discharge, *Richenberg* v. *Perry*, 73 F.3d 172 (8th Cir. 1995), and he was then discharged. Pet. 12. After briefing and argument on the merits, the court of appeals affirmed. Pet. App. 1-22. It held that 10 U.S.C. 654, its implementing directive, and petitioner's discharge did not violate the Fifth Amendment's Due Process Clause, its equal protection component, the First Amendment, the Bill of Attainder Clause, or the APA. *Ibid.*

Chief Judge Arnold dissented. Pet. App. 17-22. He expressed no view on the constitutional issues (*id.* at 19 n.9, 22), but he would have set aside petitioner's discharge on the ground that a *de novo* review of the record led him to conclude that petitioner had rebutted the presumption that he had engaged in homosexual acts or had a propensity to do so. *Id.* at 19-22. The court of appeals denied petitioner's suggestion of rehearing en banc by an equally divided court. *Id.* at 62.

ARGUMENT

The decision below is correct and in accord with the decisions of the three other courts of appeals that have considered the validity of the Act of Congress governing homosexual conduct in the military. See *Thomasson* v. *Perry*, 80 F.3d 915 (4th Cir.) (en banc), cert. denied, 117 S. Ct. 358 (1996); *Selland* v. *Perry*, 905 F. Supp. 260 (D. Md. 1995), aff'd, 100 F.3d 950 (4th Cir. 1996) (Table), cert. denied, 117 S. Ct. 1691 (1997); *Able* v. *United States*, 88 F.3d 1280 (2d Cir. 1996) (sustaining Act against First Amendment challenge and remanding for consideration of prohibition of homosexual acts); *Philips* v. *Perry*, 106 F.3d 1420 (9th Cir. 1997) (sustaining Act's prohibition

of homosexual acts).[4] This Court recently denied certiorari in two of those cases, both of which involved equal protection, First Amendment, and APA issues similar to those presented in this case. There has been no change in circumstances that would warrant a different result here. While those prior cases did not involve a claim under the Bill of Attainder Clause, that claim is unique to petitioner and without merit. Accordingly, further review is not warranted.

1. The court below correctly rejected petitioner's argument (Pet. 16-20) that 10 U.S.C. 654 and its implementing directives violate equal protection. The court of appeals first held that the statutory policy classifies on the basis of homosexual acts and the propensity to engage in such acts, not on the basis of sexual orientation or status. Pet. App. 10. The court below joined the other courts of appeals that have uniformly held that the rational-basis test applies (*id.* at 8-9), rejecting petitioner's argument (Pet. 23-24) for heightened scrutiny. The court of appeals then held that, given the special circumstances of military service, the armed forces may validly exclude those who engage in homosexual acts. Pet. App. 11. Petitioner does not challenge that holding. Further, the court below properly sustained the judgment of the Legislative and Executive Branches and of military officials that service members "with a propensity or

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[4] Two other cases challenging the "statements" portion of the Act are now pending before the Ninth Circuit. *Watson* v. *Perry*, 918 F. Supp. 1403 (W.D. Wash. 1996), appeal pending, No. 96-35314 (9th Cir.) (argued July 8, 1996); *Holmes* v. *California Army Nat'l Guard*, 920 F. Supp. 1510 (N.D. Cal. 1996), appeals pending, Nos. 96-15726 & 96-15855 (9th Cir.) (argued July 8, 1996).

intent to engage in homosexual acts" should also be excluded as a means of fostering the legitimate aims of maintaining unit cohesion, protecting privacy interests, and minimizing sexual tensions. *Id.* at 12. Given those rational and legitimate aims, the court below correctly rejected (*id.* at 10-12) petitioner's argument that the Act is impermissibly "based on invidious or irrational prejudice." Pet. 16. The Fourth and Ninth Circuits have also rejected that argument. *Thomasson* v. *Perry*, 80 F.3d at 927-931; *Philips* v. *Perry*, 106 F.3d at 1429.[5]

Contrary to petitioner's argument (Pet. 17-18), *Romer* v. *Evans*, 116 S. Ct. 1620 (1996), does not cast doubt on the validity of 10 U.S.C. 654, because there are at least four important distinctions between Colorado's Amendment 2 in *Romer* and the Act of Congress challenged here. First, 10 U.S.C. 654, which concerns military service by persons who engage in homosexual conduct, is much narrower in scope than Colorado's Amendment 2, which this Court described as a "sweeping" and "unprecedented" measure that withdrew from homosexuals the "protections against exclusion from an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society"—so much so as to "deem a class of persons a stranger to its laws." 116 S. Ct. at 1625, 1627, 1628, 1629. Second, *Romer* arose

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[5] Relying upon the express language of the Act and directive, the court of appeals (Pet. App. 13-14) also correctly rejected petitioner's argument (Pet. 25) that the presumption is effectively irrebuttable. See also *Thorne* v. *Department of Defense*, 945 F. Supp. 924, 927-929 (E.D. Va. 1996), appeal pending, No. 97-1121 (4th Cir.) (reviewing cases of eight service members who successfully rebutted the presumption and were retained in the military).

in the civilian context and does not affect precedents, such as *Parker* v. *Levy*, 417 U.S. 733, 756 (1974), holding that "Congress is permitted to legislate both with greater breadth and with greater flexibility" in the military context. See *Rostker* v. *Goldberg*, 453 U.S. 57 (1981) (sustaining men-only draft law). Third, Colorado's Amendment 2 classified on the basis of homosexual status (116 S. Ct. at 1629), whereas the Act of Congress at issue here classifies on the basis of past or likely future prohibited homosexual acts (Pet. App. 10-11). Fourth, the Act of Congress challenged here serves legitimate objectives in the military of prohibiting homosexual acts, promoting unit cohesion, protecting privacy interests, and reducing sexual tensions (*id.* at 11-12), whereas this Court found that Amendment 2 had no legitimate objective. 116 S. Ct. at 1629.

Petitioner also argues (Pet. 19-20) that the policy embodied in the Act and directives is irrational because it presumes that declared homosexuals have a propensity to engage in prohibited homosexual acts, but makes no similar presumption that undeclared homosexuals will. The basic distinction in the policy, however, is not between declared and undeclared homosexuals, but rather between (a) those service members who manifest a propensity to engage in homosexual acts by their acts, statements, or marriage to a member of the same sex, and (b) those who do not. See 10 U.S.C. 654(b). As discussed above (pp. 3-4, *supra*), a person who declares that he is homosexual can be retained if he rebuts the presumption of a propensity to engage in homosexual acts. Moreover, Congress could reasonably conclude that, in contrast to a service member who keeps his sexuality confidential, a member who declares that he is a homo-

sexual voluntarily removes his sexuality from the realm of the purely private and personal and provides a reasonable basis for the military to presume, subject to rebuttal, that he engages in, or will likely engage in, homosexual acts. See Pet. App. 12-13. In any event, even if declared and undeclared homosexuals had equal propensities to engage in homosexual acts, Congress could reasonably decide not to question or investigate all service members about their sexuality, but instead to reserve separation proceedings for those individuals who actually state their homosexuality. See *Wayte* v. *United States*, 470 U.S. 598 (1985).[6]

2. The court of appeals also correctly held that the Act of Congress governing homosexual conduct in the military is consistent with the First Amendment. Pet. App. 14-15. As the court below recognized (*id.* at 14), the Act treats a service member's statement that he is a homosexual as a basis from which to presume, in the absence of rebuttal by him, that he is a "homosexual" as defined by the Act, *i.e.*, one "who engages

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[6] Petitioner argues (Pet. 20) that the policy is irrational because the directive provides that no action will be taken against a member for "going to a gay bar, possessing or reading homosexual publications, associating with known homosexuals, or marching in a gay rights rally in civilian clothes." DoD Dir. 1332.30 Enc 8, ¶ C.3.d; Pet App. 104. Heterosexuals may also engage in those activities for a variety of reasons, however, so those activities do not provide as strong a basis for presuming homosexual acts as does a member's statement that he is a homosexual. See *Steffan* v. *Perry*, 41 F.3d 677, 690 (D.C. Cir. 1994) (en banc). Far from showing irrationality, this provision demonstrates that the Act and regulations are "carefully crafted to maintain the delicate balance between the individual concerns and the needs of the armed forces." S. Rep. No. 112, 103d Cong., 1st Sess. 274 (1993).

in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts." 10 U.S.C. 654(f)(1). The First Amendment does not prohibit such evidentiary use of a member's statement. *Thomasson* v. *Perry*, 80 F.3d at 931-934; *Able* v. *United States*, 88 F.3d at 1292-1300; *Philips* v. *Perry*, 106 F.3d at 1429-1430. See *Wayte* v. *United States*, 470 U.S. 598 (1985). In addition, expressive conduct may be restricted in the military context if it is "likely to interfere with * * * vital prerequisites for military effectiveness." *Brown* v. *Glines*, 444 U.S. 348, 354 (1980). The express legislative findings supporting the Act at issue (see 10 U.S.C. 654(a)) show that that test is met here.

3. Petitioner contends (Pet. 24-25) that the application of the current Act to him based upon a statement that he made before the Act became effective violates the Bill of Attainder Clause, Art. I, § 9, Cl. 3, and the APA. This transition issue is unique to petitioner's case, and thus it would not warrant plenary review in any event. His claim is also without merit.

Petitioner's discharge proceeding was initiated under the former policy, and the first board of inquiry recommended that petitioner be given a general discharge. Pet. App. 54. While that recommendation was under review, the current Act became effective. *Id.* at 7. Although the Act's savings provision (10 U.S.C. 654 note; Pet. App. 70-71) did not require such action, the Secretary of the Air Force directed that petitioner and the only other similarly situated individual be given the benefit of being reprocessed under the new policy. C.A. App. 436, 618. As a result, petitioner received an honorable discharge instead of the less favorable general discharge.

While the current policy differs from the former one in some respects, the standards for discharge are substantially similar; and to the extent there is any difference, the current policy is more favorable to service members because it expressly provides that sexual orientation *per se* is not a ground for discharge and that the presumption of homosexual acts arising from a statement of homosexuality can be rebutted. See *Able* v. *United States*, 88 F.3d at 1286-1287. Indeed, petitioner acknowledged in his initial statement declaring that he is a homosexual that he was "forcing [his commander] to take actions which may ultimately result in [his] discharge." Pet. App. 6-7. Thus, applying the new Act to petitioner's then-pending case did not have a prohibited retroactive effect because it did not "impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Landgraf* v. *USI Film Products*, 511 U.S. 244, 280 (1994); see also *Hughes Aircraft Co.* v. *United States ex rel. Schumer*, No. 95-1340 (June 16, 1997), slip op. 6-9.

Moreover, the Bill of Attainder Clause is implicated only when a person is punished. See *Nixon* v. *Administrator of General Services*, 433 U.S. 425, 468 (1977). An administrative separation from the military—and specifically an honorable discharge pursuant to the policy regarding homosexual conduct—is not punishment. *Meinhold* v. *Department of Defense*, 34 F.3d 1469, 1478 (9th Cir. 1994); *Rich* v. *Secretary of the Army*, 735 F.2d 1220, 1225 n.1 (10th Cir. 1984). Thus, affording petitioner the benefit of being reprocessed under the current policy did not violate the Bill of Attainder Clause or the APA.

4. Finally, petitioner argues (Pet. 25-26) that the Air Force board erred in finding that he had not rebutted the presumption, arising from his statement that he is a homosexual, that he has a propensity to engage in homosexual acts. That fact-bound determination, which both lower courts have sustained, does not warrant review by this Court. See *Branti* v. *Finkel*, 445 U.S. 507, 512 n.6 (1980).

In any event, that finding is amply supported. At the hearing, petitioner testified that he had not committed what he called "prohibited acts" in the past and that he would not commit them in the future. C.A. App. 297, 303. He testified on cross-examination, however, that he was attracted to men and found them physically attractive. *Id.* at 302, 305. When asked whether he would not be opposed to homosexual sex with "the right person," he replied, "I can't say that I've entirely accepted that yet." *Id.* at 304. Thus, as the district court recognized, the issue of whether or not petitioner rebutted the presumption "boils down to a question of credibility." Pet. App. 50. The task of resolving conflicts in the evidence at an agency hearing is normally the duty of the agency, not the court. *Richardson* v. *Perales*, 402 U.S. 389, 399-401 (1971).[7]

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[7] The substantial-evidence test applies to review of the military board's decision. See *Chappell* v. *Wallace*, 462 U.S. 296, 303 (1983). But cf. Pet. App. 15-16 n.8. Even the independent-review doctrine of *Bose Corp.* v. *Consumers Union*, 466 U.S. 485, 498-511 (1984), however, upon which the dissenting judge below relied (Pet. App. 19), permits due regard for the fact-finder's "opportunity to observe the demeanor of the witnesses." 466 U.S. at 499-500.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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